

*a***MASJAYA TRADING SDN BHD****v.****KEDAH CEMENT SDN BHD***b*

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOKHTAR SIDIN JCA
ABDUL KADIR SULAIMAN JCA
[CIVIL APPEAL NO: K-02-542-1997]
31 MAY 2004

c

CIVIL PROCEDURE: *Appeal - Appeal to Court of Appeal - Memorandum of Appeal - Whether Court of Appeal in deciding appeal confined to grounds raised in Memorandum of Appeal - Whether Court of Appeal may make such orders as the High Court ought to have made*

d

CIVIL PROCEDURE: *Appeal - Interference by appellate court - Case not properly presented through ineptitude or error of counsel - Whether appellate intervention appropriate*

e

CONTRACT: *Terms - Implied terms - Contract failing to provide for determination - Whether court may imply term that such contract is terminable on reasonable notice - Whether court merely exercising powers of interpretation by doing so*

f

CONTRACT: *Breach - Implied term - Implied obligation in contract to terminate upon giving reasonable notice - Contract terminated by defendant without giving any notice - Defendant calling for tender and awarding contract in question to third party - Whether such conduct amounted to an absolute refusal by defendant to perform its part of the contract - Whether such conduct by defendant an unlawful repudiation of the contract*

g

CONTRACT: *Estoppel - Estoppel by convention - Whether applicable on the facts*

h

CONTRACT: *Terms - Exclusivity - Whether term as to exclusivity of services rendered may be introduced into contract by conduct of parties subsequent to the making of the contract*

i

CIVIL PROCEDURE: *Estoppel - Plea of - Estoppel not expressly raised in pleaded case - All relevant facts on which estoppel may be raised pleaded - Whether sufficient to raise estoppel without express plea*

The defendant cement manufacturer entered into three written agreements with the plaintiff for the transport of its cement. The plaintiff was *inter alia* to transport the defendant's cement from its factory to a jetty for loading onto vessels. The contracts did not provide the period during which they were to remain in force. None of the contracts contained any provision for their termination. The contracts also did not provide the mechanism by which they were to be performed. During the three years that the plaintiff provided service to the defendant under the contracts, the defendant did not appoint, or assert a right to appoint, any other transporter to perform the service that the plaintiff was performing. Although the defendant in September 1986 gave notices to terminate the contracts, it withdrew these when challenged by the plaintiff. Sometime in late December 1986 the defendant engaged another transporter to provide it the identical service that it had engaged the plaintiff to perform. The defendant took the position that it had opened to tender the services it required and that some other transporter had successfully bid for that tender. The plaintiff treated the defendant's act as a wrongful repudiation and brought an action in the High Court for breach of contract. The plaintiff's case was that it was an implied term of the contracts that it had the exclusive right to pack, stack and transport the defendant's cement. It was therefore not lawfully open to the defendant to engage another transporter. The plaintiff also argued that the contracts were permanent and could not be terminated save by mutual consent. The High Court rejected the plaintiff's arguments and dismissed its claim. The plaintiff appealed to the Court of Appeal, which during the hearing of the appeal, found that the case for the plaintiff was not properly presented or sufficiently argued at the High Court. Counsel for the defendant argued that the Court of Appeal should nevertheless affirm the decision appealed against because the memorandum of appeal did not make the points that emerged through the court's questioning of counsel during argument.

Held (allowing the appeal)**Per Gopal Sri Ram JCA:**

- [1] Rule 18(2) of the Rules of the Court of Appeal 1994 makes it amply clear that the Court of Appeal in deciding an appeal is not confined to the grounds relied on by an appellant in his or her memorandum of appeal. The appeal is by way of rehearing and it is the solemn duty of the Court of Appeal to make those orders that the learned High Court judge ought to have made. The Court of Appeal will not, as far as possible, permit a litigant to suffer because of the ineptitude of his advocate. *Government of Malaysia v. Zainal bin Hashim* [1977] 2 MLJ 254 (foll); *Wong Lai Fatt v. Public Prosecutor* [1973] 2 MLJ 31 (refd). (pp 26 f-h & 27 a-b)

- a* [2] The instant case was one in which the proved and admitted facts all favoured the plaintiff as a matter of law, provided that they were slotted in the appropriate legal pigeon-hole. That did not happen through error of counsel. However, there was no reason for the Court of Appeal to sit in silence, with arms folded in abject submission and permit an obvious miscarriage of justice to live on. This was an appropriate case by reason of its peculiar facts for the Court of Appeal to intervene. (p 27 c-d)
- b*
- c* [3] The High Court judge was correct in rejecting the plaintiff's argument that the contracts could only be terminated by mutual consent. The contracts in the present case were mercantile contracts. There was nothing in them that pointed towards permanence. They must therefore be regarded as determinable upon reasonable notice. It is perfectly legitimate for a court to imply into a contract containing no provision for determination, a term that it is terminable on reasonable notice. By doing so, the court is merely exercising its power of interpretation. *Martin-Baker Aircraft Co Ltd & Anor v. Canadian Flight Equipment Ltd* [1955] 2 QB 556 (refd); *Australian Blue Metal Ltd v. Hughes* [1963] AC 74 (foll). (pp 27 e-h, 28 a-h & 29 a)
- d*
- e* [4] It was beyond dispute that the defendant did not give the plaintiff any notice to terminate the contracts. On the other hand, it withdrew the notices it gave upon being challenged by the plaintiff. Since the defendant was under an implied obligation to terminate the contract only upon giving reasonable notice, its failure to give any notice constituted a breach of contract. Further, the defendant's conduct of unilaterally calling for a tender and awarding the contract in question to a third party amounted to an absolute refusal to perform its part of the contract and hence an unlawful repudiation. On the facts of this case the defendant was guilty of a breach of contract. *Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd* [1985] 1 CLJ 541; [1985] CLJ (Rep) 266. (p 29 b-c)
- f*
- g* [5] Having objective regard to the totality of the evidence, estoppel by convention was the most appropriate method of giving effect to the true intention of the parties in the present instance. Based on all the circumstances of the case, the conduct of the parties intended that the contracts were to confer on the plaintiff the exclusive right to perform the service in question. *The Indian Endurance (No 2), Republic of India v. India Steamship Co Ltd* [1998] AC 878 at 913 (foll); *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283 (foll). (pp 30 h & 31 a-g)
- h*
- i*

[6] The evidence viewed as a whole, reasonably supported the inference that the parties throughout the three year period proceeded on the common assumption that the plaintiff was to have the exclusive right to perform the services prescribed by the contracts. Further, a reasonable man in the position of the plaintiff would have certainly been led to believe by the defendant's conduct over the three years that he was to have the sole and exclusive right to perform the service contracted for. Conduct subsequent to the making of a contract may be used to support an estoppel and thereby introduce a term into that contract which was not there in the first place. In the instant case, the defendant was, on this alternative basis, guilty of breach of contract for reneging on the term as to exclusivity that had become introduced into the contracts by its conduct. *Amalgamated Investment and Property Co Ltd (In liquidation) v. Texas Commerce International Bank Ltd* [1982] 1 QB 84. (pp 32 e-h & 33 a-e)

[7] Although the plaintiff's pleaded case did not expressly raise estoppel, all relevant facts on which an estoppel might arise were pleaded. That was sufficient and an express plea was not necessary. *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283 (refd); *Lever Bros Ltd v. Bell* [1931] 1 KB 557 (refd). (p 33 f-h)

[*Per curiam/Semble: Judicial guidelines laid down from time to time for the purpose of determining contractual intention are not to be treated as if they are words in an Act of Parliament; whenever contractual intention is in issue, there is no substitute for a meticulous examination of the facts.*]

[*Bahasa Malaysia Translation Of Headnotes*]

Defendan, yang mengusaha kilang simen, telah menandatangani tiga perjanjian dengan plaintif bagi pengangkutan simen-simennya. Antara lain, plaintif bersetuju mengangkut simen-simen defendan dari kilang ke jeti bagi dipunggahkan ke kapal. Perjanjian tidak mengandungi sebarang peruntukan tentang tempoh masa kontrak berkuatkuasa. Perjanjian juga tidak mengandungi fasal mengenai penamatan kontrak. Selain itu, tidak ada mekanisma diperuntukkan tentang bagaimana kontrak akan disempurnakan. Dalam tempoh tiga tahun plaintif menjalankan kerja-kerja pengangkutan di bawah kontrak untuk defendan, defendan tidak pernah melantik, atau membangkitkan hak untuk melantik mana-mana pengangkut lain untuk melakukan perkhidmatan yang diberi oleh plaintif. Pada September 1986 defendan memberi notis kepada plaintif bagi menamatkan kontrak, namun telah menarik balik notis tersebut apabila dibantah oleh plaintif. Walaupun begitu, pada bulan Disember 1986, defendan telah melantik satu pengangkut lain bagi memberi perkhidmatan yang sama seperti yang diberi oleh plaintif. Pendirian defendan adalah bahawa ia telah membuka tender untuk perkhidmatan yang perlukan dan satu pengangkut lain telah berjaya memenangi

- a* tender tersebut. Plaintiff menganggap perbuatan defendan sebagai satu penolakan salah dan telah memfail tindakan kemungkiran kontrak di Mahkamah Tinggi. Kes plaintiff adalah bahawa menjadi terma tersirat kontrak bahawa ia mempunyai hak eksklusif untuk membungkus, menyusun dan mengangkut simen-simen defendan, yang bermakna defendan tidak berhak untuk melantik mana-mana pengangkut lain. Plaintiff juga mengatakan bahawa kontrak adalah kekal dan tidak boleh dibatal kecuali dengan persetujuan bersama mereka. Mahkamah Tinggi menolak hujah plaintiff serta tuntutan. Plaintiff merayu ke Mahkamah Rayuan di mana, semasa rayuan sedang berjalan, mahkamah mendapati bahawa kes plaintiff telah tidak dikemukakan dengan sewajarnya atau telah tidak dihujah dengan secukupnya di hadapan Mahkamah Tinggi. Peguam defendan berhujah bahawa Mahkamah Rayuan harus mengesahkan keputusan yang dirayu oleh kerana memorandum rayuan tidak mengandungi perkara-perkara yang berbangkit sewaktu mahkamah menyoal peguam ketika penghujahan.

Diputuskan (membenarkan rayuan)

- d* **Oleh Gopal Sri Ram HMR:**

- e* [1] Aturan 18(2) Kaedah-Kaedah Mahkamah Rayuan 1994 menyatakan dengan jelas bahawa Mahkamah Rayuan semasa memutuskan rayuan tidak dibatasi oleh alasan-alasan yang dikemukakan oleh perayu dalam memorandum rayuannya. Rayuan adalah secara pendengaran semula dan ia menjadi tugas mulia Mahkamah Rayuan untuk membuat perintah-perintah yang sepatutnya telah dibuat oleh yang arif hakim Mahkamah Tinggi. Mahkamah Rayuan selagi boleh tidak akan membiarkan mana-mana litigan menderita disebabkan oleh ketidakcekapan peguamnya (*Government of Malaysia v. Zainal bin Hashim* [1977] 2 MLJ 254 (diikuti); *Wong Lai Fatt v. PP* [1973] 2 MLJ 31 (dirujuk)).
- f*
- g* [2] Kes semasa adalah satu kes di mana fakta-fakta yang dibuktikan dan diakui, sebagai suatu perkara undang-undang, semuanya berpihak kepada plaintiff jika diletakkan ditempatkan yang wajar dan sepatutnya. Ini tidak berlaku disebabkan kesilapan peguam. Bagaimanapun, tidak ada sebab mengapa Mahkamah Rayuan harus berdiam diri, memeluk tangan dengan penuh ketundukan dan membiarkan salah laksana keadilan yang begitu jelas berlaku begitu sahaja. Ini adalah kes yang sesuai, disebabkan oleh fakta-faktanya yang khusus, untuk Mahkamah Rayuan campur tangan.
- h* [3] Mahkamah Tinggi betul apabila menolak hujah plaintiff bahawa kontrak boleh ditamatkan melalui persetujuan bersama. Kontrak-kontrak di sini adalah kontrak perniagaan. Tiada apa pun didalamnya yang menunjuk kepada kekekalan. Kontrak dengan itu harus dianggap sebagai boleh ditamatkan dengan notis. Adalah tidak salah bagi mahkamah membayangkan
- i* ke dalam kontrak yang tidak mempunyai peruntukan penamatan, suatu peruntukan bahawa ia boleh ditamatkan dengan notis. Dalam berbuat

demikian mahkamah hanya menggunakan kuasa untuk mentafsirnya (*Martin-Baker Aircraft Co Ltd & Anor v. Canadian Flight Equipment Ltd* [1955] 2 QB 556 (dirujuk); *Australian Blue Metal Ltd v. Hughes* [1963] AC 74 (diikuti)).

[4] Tidak dinafikan bahawa defendan tidak memberi apa-apa notis kepada plaintif untuk menamatkan kontrak. Sebaliknya, notis yang diberi telah ditarik balik apabila dicabar oleh plaintif. Oleh kerana defendan tertakluk kepada tanggungjawab tersirat untuk menamatkan kontrak dengan notis, kegagalannya memberi notis adalah satu kemungkiran kontrak. Selain itu, kelakuan defendan dalam memanggil tender secara bersendirian dan mengawardkan kontrak kepada pihak ketiga merupakan satu penolakan mutlak untuk melaksanakan tanggungjawabnya di dalam kontrak dan oleh itu adalah satu penolakan tak sah. Di atas fakta kes, defendan bersalah kerana kemungkiran kontrak (*Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd* [1985] 1 CLJ 541; [1985] CLJ (Rep) 266).

[5] Menilai keterangan-keterangan secara objektif, estoppel melalui konvensi adalah cara yang sesuai untuk memberi kesan kepada niat sebenar pihak-pihak dalam kes ini. Berdasarkan keseluruhan keadaan kes, kelakuan pihak-pihak menunjukkan bahawa mereka berniat supaya kontrak memberikan hak eksklusif kepada plaintif untuk melaksanakan perkhidmatan yang berkaitan (*The Indian Insurance (No. 2), Republic of India v. India Steamship Co Ltd* [1988] AC 878 di 913 (diikuti); *Boustead Trading (1985) v. Arab-Malaysian Merchant Bank* [1995] 4 CLJ 283 (diikuti)).

[6] Keterangan pada keseluruhannya menyokong andaian bahawa untuk tempoh tiga tahun tersebut pihak-pihak telah meneruskan kegiatan mereka atas anggapan bersama bahawa plaintif mempunyai hak eksklusif untuk memberi perkhidmatan yang dinyatakan di dalam kontrak. Selain itu, seorang yang munasabah yang berada pada kedudukan plaintif pasti akan dipengaruhi oleh kelakuan defendan untuk mempercayai bahawa beliau mempunyai hak mutlak untuk memberikan perkhidmatan yang dikontrakkan itu. Kelakuan selepas kontrak ditandatangani juga boleh digunakan untuk menyokong estoppel, yang bermakna menambah satu terma ke dalam kontrak apa yang tidak ada sebelumnya. Berdasarkan asas alternatif ini, defendan dalam di sini telah memungkirkan kontrak kerana melanggar terma hak mutlak, yang menjadi satu terma kontrak disebabkan oleh kelakuannya (*Amalgamated Investment and Property Co Ltd (In liquidation) v. Texas Commerce International Bank Ltd* [1982] 1 QB 84).

[7] Walau pun kes yang dihidang oleh plaintif tidak membangkitkan soal estoppel, fakta-fakta relevan yang boleh membangkitkan estoppel kesemuanya telah dihidang oleh plaintif. Itu sudah memadai dan pengatahan secara terus adalah tidak

- a* perlu (*Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283 (dirujuk); *Lever Bros Ltd v. Bell* [1931] 1 KB 557 (dirujuk)).

- b* [Per curiam/Semble: Panduan-panduan kehakiman yang diperturunkan dari masa ke semasa bagi tujuan menentukan niat kontraktual hendaklah dianggap sebagai perkataan-perkataan di dalam Akta Parlimen; di mana niat kontraktual menjadi isu, tidak ada ganti bagi pemeriksaan yang teliti fakta-fakta.]

Case(s) referred to:

- c* *Amalgamated Investment and Property Co Ltd v. Texas Commerce International Bank Ltd* [1982] 1 QB 84 (**refd**)
Australian Blue Metal Ltd v. Hughes [1963] AC 74 (**fol**)
Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC (**fol**)
Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales [1982] 149 CLR 337 (**refd**)
- d* *FIN Soft Holding SA v. Rowil Interim Management BV & Anor* [2003] EWHC 1433 (**refd**)
Government of Malaysia v. Zainal Hashim [1977] 2 MLJ 254 (**fol**)
Hannah Blumenthal and Classical Contract Law [1986] 102 LQR 363 (**refd**)
Lever Bros Ltd v. Bell [1931] 1 KB 557 (**refd**)
Martin-Baker Aircraft Co Ltd & Anor v. Canadian Flight Equipment Ltd [1955] 2 QB 556 (**refd**)
- e* *Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd* [1985] 1 CLJ 541; [1985] CLJ (Rep) 266 FC (**refd**)
Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC (**refd**)
Sudbrook v. Eggleton [1983] AC 444 (**refd**)
- f* *The Indian Endurance (No 2), Republic of India v. India Steamship Co Ltd* [1998] AC 878 (**fol**)
Wong Lai Fatt v. PP [1973] 2 MLJ 31 (**refd**)

Legislation referred to:

- Rules of the Court of Appeal 1994, r. 18(2)
- g* For the appellant - *E Mayandi; M/s Mayandi & Panjaram*
 For the respondent - *Robert Lazar & Lai Wai Fong; M/s Shearn Delamore & Co*
 [Appeal from High Court, Alor Setar; Civil Suit No: 23-31-90]
 Reported by Andrew Christopher Simon

JUDGMENT

- h* **Gopal Sri Ram JCA:**

Introduction

- i* This is the judgment of the court. For convenience we will refer to the parties according to the title assigned to them in the court below. The facts of this case are not in dispute.

Facts And Background

The defendant manufactures cement in Pulau Langkawi. It had to get its cement from its factory and onto ships that called at the jetty at Telok Ewa for onward carriage. In 1984 it engaged the plaintiff to transport the cement. It was an informal arrangement. In 1985, the arrangement was formalised. The defendant entered into three written contracts with the plaintiff. These are dated 2 October 1985, 16 November 1985 and 9 January 1986. Save for the rate of the charges, all three contracts contain almost the same terms. For the present, nothing turns on any difference between their contents. But there are some significant features about the contractual relations as well as the surrounding circumstances that require mention.

First, the plaintiff undertook the principal obligation of packing, stacking and transporting the manufactured cement from the defendant's factory to the loading main and jetty at Telok Ewa and to load it onto vessels. Second, the plaintiff was to provide qualified and experienced workers to perform its primary obligation. Third, the plaintiff was to provide 8 lorries to transport the defendant's cement from the factory to the jetty. Fourth, the contracts did not provide the period during which they were to remain in force. Fifth, none of the contracts contained any provision for their termination. Sixth, the contracts did not provide the mechanism by which they were to be performed. However, the learned judge found as a fact – a finding which we accept as entirely accurate – that although there was no term to that effect, a practice was established whereby the defendant would inform the plaintiff each time a ship called at Telok Ewa. The plaintiff would then send its lorries and its workers to the defendant's factory to carry out its task of packing, stacking and transporting the cement to the jetty. Seventh, there is evidence that from time to time the defendant complained to the plaintiff about the quality of the latter's service. But nothing came out of it. Despite making complaints, the defendant entered into each of the successive three contracts. The last written complaint was made in January 1986, despite which the defendant entered into the third contract dated 9 January 1986. Eighth, during the three years that the plaintiff provided service to the defendant under the contracts, the defendant did not appoint, or assert a right to appoint, any other transporter to perform the service that the plaintiff was performing. Ninth, although the defendant in September 1986 gave notices to terminate the contracts, it withdrew these when challenged by the plaintiff. Tenth, the contractual relationship continued until late December 1986. At that point in time, when a vessel called at the jetty, the defendant failed to inform the plaintiff in the usual way. Instead, it engaged another transporter to provide it the identical service that it had engaged the plaintiff to perform. The defendant took the position that it had opened to tender the services it required and that some other transporter had successfully bid for that tender.

- a* The plaintiff treated the defendant's act as a wrongful repudiation and brought an action for breach of contract. The main – and indeed the only – plank of the plaintiff's case was that it was a term of the contracts that it had the exclusive right to pack, stack and transport the defendant's cement. It was therefore not lawfully open to the defendant to engage another transporter. The
- b* contracts did not contain an express term to that effect. But the plaintiff's argued that such a term ought to be implied. The plaintiff also argued that the contracts were permanent and could not be terminated save by mutual consent. The learned judge rejected both arguments. He found for the defendant and dismissed the claim. The plaintiff then appealed to this court. We heard
- c* arguments on the appeal and allowed it on 25 May 2004 and now give our reasons.

The Main Grounds

- d* In our view, the special facts of this case disclose two alternative grounds on which the plaintiff is entitled to succeed. The undisputed facts relating to both grounds were placed before the learned judge. Unfortunately the case for the plaintiff was not properly presented or sufficiently argued. Had it been, then we have no doubt that the learned trial judge would have found for the plaintiff. Mr Robert Lazar of counsel for the defendant says that we should nevertheless affirm the decision appealed against because the memorandum of appeal does
- e* not make the points that emerged through our questioning of counsel during argument. With respect, we cannot agree.

- f* In the first place, r. 18(2) of the Rules of the Court of Appeal 1994 makes it amply clear that this Court in deciding an appeal is not confined to the grounds relied on by an appellant in his or her memorandum of appeal. In the second place, this appeal is by way of rehearing and it is our solemn duty to make those orders that the learned judge ought to have made. As Suffian LP said in *Government of Malaysia v. Zainal bin Hashim* [1977] 2 MLJ 254:

- g* Appeals to this court are by way of rehearing and we may give any judgment, make any order which ought to have been given or made (by the trial court) and make such further or other orders as the case requires, section 69(1) and (4) of the Courts of Judicature Act No. 7 of 1964. This means, on the authority of *Quilter v. Mapleson* [1881-2] 9 QBD 672 that we are authorised to make such order on this appeal as ought to be made according to the law as it stands not at the time of the trial but at the time of this appeal.

- h* In the third place, this Court will not, as far as possible, permit a litigant to suffer because of the ineptitude of his advocate. In a case as the present, it is apposite that we call to mind what Ong CJ said in *Wong Lai Fatt v. Public Prosecutor* [1973] 2 MLJ 31:

i

The paramount function and duty of the courts is to see that justice is done in all cases. As stated by Lord Denning MR in *Doyle v. Olby Ltd* [1969] 2 QB 159, 166: **a**

We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side. **b**

Those words were said in a civil case where counsel had made an erroneous submission on the proper measure of damages.

Now, here we have a case in which the proved and admitted facts all favour of the plaintiff as a matter of law provided that they are slotted in the appropriate legal pigeon-hole. That did not happen through error of counsel. But that is no reason for us to sit in silence, with our arms folded in abject submission and permit an obvious miscarriage of justice to live on. Based on the authorities cited we consider that this is an appropriate case by reason of its peculiar facts to intervene. With that we now turn to deal with the first ground on which the plaintiff ought to have succeeded. **c**

d

The First Ground: The Notice Point

None of the contracts expressly provide for their termination. That, of course, does not mean that they are permanent contracts or contracts in perpetuity. The learned judge was therefore entirely correct in rejecting the plaintiff's argument that the contracts could only be terminated by mutual consent. But that is not the end of the matter. For, in contracts as the present, the law will imply a term that they may be terminated upon reasonable notice. **e**

Martin-Baker Aircraft Co Ltd & Anor v. Canadian Flight Equipment Ltd [1955] 2 QB 556 is the locus classicus on the subject. The plaintiffs, an English company, granted to the defendants, a Canadian company, the right to make ejector seats and sell them in return for a fixed royalty. The agreement did not expressly provide for termination. The plaintiff brought an action for a declaration that they were entitled to determine the agreement by reasonable notice. The defendants contended that the contract was perpetual and could be terminated only by mutual consent. The court found for the plaintiffs. McNair J said: **f**

g

It is to be borne in mind that this agreement is an agreement in a commercial or mercantile field. No case was cited to me where it has been held that this doctrine of irrevocability applies to a contract in the commercial or mercantile field, and I do not feel that the law merchant would normally look at such an agreement as this as being an agreement intended to constitute permanent relationships. For example, I have little doubt that the law merchant would **h**

i

- a* regard a contract for the sale of a hundred tons of coal monthly at a fixed price, no period being specified, as a contract determinable on reasonable notice. The common law, in applying the law merchant to commercial transactions has always proceeded, when filling up the gaps in a contract which the parties have made, on the basis of what is reasonable, so far as that does not conflict with the express terms of the contract, rather than on
- b* the basis of rigidity.

In a later passage the learned judge said:

- c* It is, of course, quite true that this kind of consideration can in many cases be excluded by express provision; but, where the contract leaves the matter open, I think that the common law approach would be to provide a solution which is reasonable. At the same time I bear in mind that it is not the function of the court to make a reasonable contract between the parties, and, in so far as the matter is one of implying terms, one can only imply terms which are reasonable to give business efficacy to the contract. To my mind,
- d* however, the question whether a contract such as this is permanent or revocable does not depend on the insertion of an implied term, but depends on the true construction of the language used. This is certainly the view expressed by Lord MacDermott in the *Winter Garden Theatre case Winter Garden Theatre (London), Ltd. v. Millenium Productions, Ltd.* [1948] AC 173. Accordingly, subject to there being anything in the agreements of Aug. 26,
- e* 1951, and Mar. 9, 1954, which is inconsistent with their being revocable, I would favour the view that they are revocable.

So too here. The contracts in the present case are mercantile contracts. And there is nothing in them that point towards permanence. They must therefore be regarded as determinable upon reasonable notice.

- f* Before we move on, there is one reservation we wish to make on the views expressed by McNair J in *Martin-Baker Aircraft Co Ltd & Anor v. Canadian Flight Equipment Ltd.* It is this. We are unable to accept as a proposition of law that “the question whether a contract ... is permanent or revocable does not depend on the insertion of an implied term”. Later cases tell against such
- g* a view.

Thus, in *Australian Blue Metal Ltd v. Hughes* [1963] AC 74 Lord Devlin accepted that:

- h* It is true that it does not require very much to induce a court to read into an agreement of a commercial character, either by construction or by implication, a provision that the arrangements between the parties, whatever they may be, shall be terminable only on reasonable notice.

i

In our judgment, it is perfectly legitimate for a court to imply into a contract containing no provision for determination, a term that it is terminable on reasonable notice. By doing so, the court is merely exercising its power of interpretation.

In the present case it is beyond dispute that the defendant did not give the plaintiff any notice to terminate the contracts. On the other hand, it withdrew the notices it gave upon being challenged by the plaintiff. Since the defendant was under an implied obligation to terminate the contract only upon giving reasonable notice, its failure to give any notice constitutes a breach of contract. Further, the defendant's conduct of unilaterally calling for a tender and awarding the contract in question to a third party amounts to an absolute refusal to perform its part of the contract and hence an unlawful repudiation: *Rasiah Munusamy v. Lim Tan & Sons Sdn Bhd* [1985] 1 CLJ 541; [1985] CLJ (Rep) 266. It follows that on the facts of this case the defendant was guilty of a breach of contract.

The Alternative Ground: The Estoppel Point

As earlier observed, the High Court was invited to imply a term that the plaintiff had the exclusive right to perform the services in question. The learned judge declined the invitation. He gave his reasons as follows:

I agree with Cik Maidzura that the parties in the present case do not have the 'special relationship' as stipulated by the Court of Appeal in *Datuk Yap Pak Leong (Datuk Yap Pak Leong) v. Sababumi (Sandakan) Sdn. Bhd.* [1997] 1 MLJ 587 and, hence, the contracts executed fall within Category II as defined in that case. **Therefore, the question which this Court should direct its mind to now is whether there is a need to imply terms to give the contracts business efficacy.** Based on the authorities cited and the facts of this case, the answer must be in the negative. Although witnesses from both parties did give evidence regarding the terms of the plaintiff's appointment, yet neither party raised complaints about the business efficacy of the contracts. Each party was able to carry out its part of the bargain. In view of this, I see no necessity for this Court to imply any terms into the contracts. The contracts should be accepted and interpreted in their present form.

Finally, I accept Cik Maidzura's argument that if it was the intention of both parties that the appointment should be exclusive, then it would have been a very important term of the contracts and such a term would have been incorporated in the contracts. The fact that such a term was not incorporated in the contracts only goes to show that the parties never intended the plaintiff to be the sole appointee. It follows that it would not be reasonable and equitable for this Court to rule that such a term is implicit in the agreements. (emphasis added.)

- a* In our judgment, the learned judge asked himself the wrong question. The question he should have asked himself is whether, having regard to the special facts of this case, the parties intended that the plaintiff should have the exclusive right of providing the service in question.
- b* It must not be forgotten that implying a term in a contract is an exercise of the court's interpretive jurisdiction. Thus, as Mason J said in *Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales* [1982] 149 CLR 337 at p. 345:
- c* When we say that the implication of a term raises an issue as to the meaning and effect of the contract, we do not intend by that statement to convey that the court is embarking upon an orthodox exercise in the interpretation of the language of a contract, that is, assigning a meaning to a particular provision. Nonetheless, the implication of a term is an exercise in interpretation, though not an orthodox instance.
- d* And in implying a term what the court does is to ascertain and give effect to the true intention of the parties to the contract. In *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503 Peh Swee Chin FCJ said:
- e* The two tests (the officious bystander and the business efficacy tests) referred to earlier are to enable the court to decide as to whether it should or should not infer that the implied term contended for is a term which parties to a contract must have intended to include in the contract. Such being the case, the intention of both parties from the contract in question ought to be ascertained.
- f* But the power to imply a term in an agreement is only one of the several weapons in the judicial armoury to give effect to the true intention of the contracting parties. There are others. Interpretation, estoppel by convention, rectification and substitution of machinery modelled along the lines of the decision of the House of Lords in *Sudbrook v. Eggleton* [1983] AC 444 are among them: See, *FIN Soft Holding SA v. Rowil Interim Management BV & Anor* [2003] EWHC 1433 (Comm). The choice of weapon in a particular case
- g* must ex necessitate rei depend on its peculiar facts. Of course, in some cases the court may have to resort to more than one of the settled techniques for giving effect to the intention of the parties.
- h* Having objective regard to the totality of the evidence, we consider estoppel by convention to be the most appropriate method of giving effect to the true intention of the parties in the present instance. We say "objective regard" advisedly because the law requires an objective test for determining and giving effect to the intention of the parties to a contract. It is of interest that in an
- i*

article titled “*Hannah Blumenthal and Classical Contract Law*” [1986] 102 LQR 363, Professor Atiyah, a jurist whose views are held in high regard by courts throughout the Commonwealth has argued that the objective test, in substance, involves some form of estoppel. a

The ambit of the doctrine of estoppel by convention was explained by Lord Steyn in *The Indian Endurance (No 2), Republic of India v. India Steamship Co Ltd* [1998] AC 878 at 913 as follows: b

It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption: *K. Lokumal & Sons (London) Ltd. v. Lotte Shipping Co. Pte. Ltd.* [1985] 2 Lloyd’s Rep. 28; *Norwegian American Cruises A/S v. Paul Mundy Ltd.* [1988] 2 Lloyd’s Rep. 343; *Treitel, The Law of Contract*, 9th ed. (1995), pp. 112-113. It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention. c
d

In *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, the Federal Court established the true nature of the doctrine of estoppel in all its facets: e

The time has come for this court to recognize that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless. f

In the present case, the question is this: Based on the conduct of the parties did they intend that the contracts were to confer on the plaintiff the exclusive right to perform the service in question? In our judgment, based on all the circumstances of the case this question must receive an affirmative answer. g

Some of the more important circumstances were indeed drawn to the attention of the learned judge and finds mention in his judgment but they failed to impress him:

Encik Mayandi also submits that in the present case the Court should take into consideration the contractual requirements, the conduct of the parties and the plaintiff’s position in the contractual relationship when construing the parties’ three contracts. He pointed out that it was evident from the following that the appointment was intended to be exclusive: h

i

- a** (i) that the plaintiff took a bank loan for the purpose of this contract;
- (ii) that the plaintiff was required to keep a large number of monthly paid workers;
- b** (iii) that the workers retained in this category were drivers, clerks, general workers and a mechanic;
- (iv) that the plaintiff was required to keep eight lorries hired from a mainland owner on standby whether or not there was work;
- (v) that the agreement of 16 November 1985 required the plaintiff to carry out various services;
- c** (vi) that the defendant immediately withdrew its termination letter upon the threat of a legal action founded on a wrongful termination of the contract.

d There are two additional facts that assist the plaintiff. We have already mentioned them in para. 3 of this judgment. But it is useful to recall them. First, despite the defendant's complaints about the quality of the plaintiff's service, it did not appoint anyone else to do the work. Second, throughout the three year period, the defendant did not assert a right to appoint someone in addition to the plaintiff to perform the service.

e Therefore, when the evidence in this case is viewed as a whole, it reasonably supports the inference that the parties throughout the three year period proceeded on the common assumption that the plaintiff was to have the exclusive right to perform the services prescribed by the contracts. And that is the inference the learned judge ought to have drawn.

f Further, we think that a reasonable man in the position of the plaintiff would have certainly been led to believe by the defendant's conduct over the three years that he was to have the sole and exclusive right to perform the service contracted for. Indeed, the evidence shows that that is exactly what happened.

g The parties having proceeded on the foregoing basis, it would be manifestly unjust for the defendant to now say that it did not intend for the plaintiff to have the sole and exclusive right to perform the service under the contracts in question. Indeed, it does not matter what the defendant says it intended or did not intend. Its intention is to be gathered from all the events surrounding the making of the contracts as well as the defendant's subsequent conduct.

h That conduct subsequent to the making of a contract may be used to support an estoppel and thereby introduce a term into that contract which was not there in the first place was settled by the judgment of Lord Denning in *Amalgamated Investment and Property Co Ltd (In liquidation) v. Texas Commerce International Bank Ltd* [1982] 1 QB 84:

i

Although subsequent conduct cannot be used for the purpose of interpreting a contract retrospectively, yet it is often convincing evidence of a course of dealing after it. There are many cases to show that a course of dealing may give rise to legal obligations. It may be used to complete a contract which would otherwise be incomplete; see *Brogden v. Metropolitan Railway Co.* [1877] 2 App. Cas. 666, 682, per Lord Hatherley. **It may be used so as to introduce terms and conditions into a contract which would not otherwise be there** (*J. Spurling Ltd. v. Bradshaw* [1956] 1 WLR 461); *Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Association* [1966] 1 WLR 287, 308, 316, 317, CA; and [1969] 2 AC 31, 90, per Lord Morris of Borth-y-Gest; p. 104, per Lord Guest, and p. 113, per Lord Pearce, all disapproving the dictum of Lord Devlin in *McCutcheon v. David Macbrayne Ltd.* [1964] 1 WLR 125, 134, and *Hollier v. Rambler Motors (A.M.C.) Ltd.* [1972] 2 QB 71, 77-78, per Salmon LJ If it can be used to introduce terms which were not already there, it must also be available to add to, or vary, terms which are there already, or to interpret them. (emphasis added.)

In the present case, we feel the learned judge, with respect, fell into error by adopting too rigid, too straight jacketed a view of the case. There is no doubt in our minds whatsoever that if he had adopted a more liberal, a broad-brush, approach to the facts he would have seen at once that this was a case in which the parties conducted themselves in such a way towards each other as to show that they did intend the plaintiff to have an exclusive contract. Accordingly, in our opinion, the defendant was, on this alternative basis, guilty of breach of contract for reneging on the term as to exclusivity that had become introduced into the contracts by its conduct.

Mr. Lazar submits that we ought not to permit the plaintiff to succeed on the footing of estoppel because it was not pleaded. It is true that the plaintiff's pleaded case does not expressly raise estoppel. However, all the relevant facts on which an estoppel may arise were pleaded. That is sufficient. An express plea is not necessary: *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd*; *Lever Bros Ltd v. Bell* [1931] 1 KB 557, per Scrutton LJ at pp. 582-583. It was therefore open to the learned judge to find for the plaintiff on the basis of estoppel. He did not. We must.

Before we conclude, there is one observation of some importance we wish to make. This case illustrates the danger of dealing with issues of law in watertight compartments without regard to particular facts. It also illustrates the danger of treating judicial guidelines laid down from time to time for the purpose of determining contractual intention as if they are words in an Act of Parliament. They are not. Whenever contractual intention is in issue, there is no substitute for a meticulous examination of the facts.

a **Conclusion**

For the reasons already given, this appeal was allowed. Judgment was entered for the plaintiff as prayed for in its statement of claim. The suit was then remitted to the senior assistant registrar of the High Court to assess the damages sustained by the plaintiff by reason of the defendant's breach of contract. Other orders that are usually consequent upon a successful appeal were also made.

c

d

e

f

g

h

i